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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-1488

ROGERS C. B. MORTON, SECRETARY OF INTERIOR,
Appellant,
vs.
STATE OF NEW MEXICO, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of New Mexico

BRIEF OF AMICI CURIAE STATE OF WYOMING WYOMING LIVESTOCK BOARD

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PREFACE

The State of Wyoming, along with all western states, is concerned with the federal intrusion into the control of its livestock industry. This Amicus Brief will not attempt to restate or add to the legal arguments as put forth in the Appellees' Brief filed by the State of New Mexico or the Amicus Brief of the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe, but incorporates and endorses those arguments herein. The sole function of this Amicus Brief is to lend support to the Appellees' position by stating the factual situation as it exists in Wyoming and as it is germane to the case at bar.

OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by the Amici.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3 of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers"), provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress (1890) Admitting the State of Wyoming into the Union (26 Statutes at Large 222, Chap. 664) provides in part:

> Be it enacted, etc., that the State of Wyoming is hereby declared to be a state of the United States of America and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be and the same is hereby accepted ratified and confirmed.

CONSENT

Both the State of Wyoming and the Wyoming Livestock Board appear with the consent of the Appellant and Appellees

pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICI CURIAE

The livestock industry has been and is now the principle industry of the State of Wyoming. According to the 1970 Department of Commerce, Bureau of Census, statistics[1], more Wyoming people are employed in the agriculture industry than in any other single industry including mining, construction and manufacturing[2]. The Wyoming Constitution provides that the Legislature "...shall pass all necessary laws to provide for the protection of livestock against the introduction and spread of...infectious or contagious diseases," and that the Legislature "...shall also establish a system of quarantine or inspection and such other regulations as may be necessary for the protection of stock owners and most conducive to the stock entrance within the state." Article 19, Section 1, Wyoming Constitution.

The Wyoming Livestock Board (hereinafter Board), composed of seven stockmen appointed by the Governor (W.S. 11-261), is charged with the duty of promulgating and enforcing rules, regulations and orders for the inspection, testing or quarantining all livestock (W.S. 11-263(5)). The Board also administers the brand and inspection laws of the State (W.S. 11-319 thru 11-392) and the Estray laws (W.S. 11-498 thru 11-515).

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[1]U.S. Bureau of Census, Census of Population: 1970 GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C52, Wyoming, United States Government Printing Office, Washington, D.C. 1971.

[2]Table 123,pp. 154 & 155 of the publication cited in Footnote #1 states that 12,286 persons were employed in the industry of agriculture, forestry and fisheries while 10,647 were employed in the mining industry, 8,511 in the construction industry, and 7,939 persons were employed in the manufacturing industry in Wyoming in 1970.

The State and the Board have a deep interest in having the Appellees' position affirmed. Loss of local control over the primary industry of the State could have catastrophic social and economic impact. Since forty-eight percent (48%)[3] of the total area of Wyoming is federally owned land and therefore subject to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, 85 Stat. 649 (hereinafter referred to as the Act), and since the Act purports to exercise jurisdiction over all free-roaming wild horses and burros whether or not they be on public or private land, the federal legislation herein challenged exerts a major impact on the State of Wyoming and its livestock industry.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case made by the Appellees.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands, and as infringing on the "Police Powers" reserved to the States.

INTRODUCTION AND SUMMARY

The broad expanse of range land in Wyoming provides an ideal climate for the uncontrolled herds of wild horses and burros. While the sight of a wild herd or a lone wild stallion prompts images of the rebellious western ethic of a pioneer time that deserves protection lest it be forever lost, the fact is that the subjects of the Act herein challenged are not in any sense an Endangered Species. They are horses and burros like any tame ranch and farm variety except for the fact that they inhabit their natural environment and display the behavior

[3]Inventory Report on Real Property Owned by the United States Throughout the World, June, 1974, GS1.15, 1974, 559A, Table 4, Comparison of federally owned land with total acreage of states.

that results from such an existence. Many members of such wild herds were at one time in their life domesticated animals. The herds are constantly replenished by reproduction and the introduction of strays and castaways from area agricultural operations. Most Federal, State and private authorities agree that the number of such animals is increasing, rather than "...fast disappearing from the American scene," as Congress was led to believe.

The problem with the loss of local control over the delicate balance between wild herds and domesticated livestock in Wyoming is that without the provisions of the State Estray laws relative to capture and control of such animals, the local rancher or farmer finds himself without an effective remedy to prevent disease and/or damage to his livestock. Apart from the constitutional issue that the Act intrudes into an area of traditional State control, the Act, as drawn, is incapable of dealing with the problem it seeks to remedy. The shortcomings of the Act as it applies to Wyoming were summarized by Dean T. Prosser, Jr., Chief Brand Inspector for the Wyoming Stock Growers Association, in his testimony before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs of the United States House of Representatives, August 12, 1975:

> "The Act provides authority for individuals to come and prove ownership of private animals on public lands and where located. The efforts made to gather private animals have been unsuccessful because of the rough terrain and the enormous expanse of the public domain. The only methods legally available at the present time are corralling by use of domestic horses or by trapping at water holes. The prohibition against use of aircraft or mechanized equipment in the capture of these animals has proven a large detriment to management of the animals as required under the Act. Originally it was estimated that privately owned horses could be removed within two years; however, it is now evident that under present legislation it may never be accomplished. Many claimants are reluctant to claim or attempt to gather

animals because of the trespass fees levied against them and because of their inability to remove the animals without the aid of motorized vehicles.

"The hard fact is that Congress, while charging the Secretaries of Interior and Agriculture with the management of these animals neglected to provide them with the tools necessary to do an effective job of such management. It is essential that wild horse populations be actively managed so that a fair balance of livestock, wildlife and horse and burro population is established and maintained under a true multiple-use concept."

At present it is estimated that there are 8,163 wild horses in the State of Wyoming with a projected population of 14,774 such animals in 1978.[4] The State Estray Laws provide for control over such wild herds to prevent spread of disease and damage to domesticated livestock and at the same time provide protection from wholesale roundup and slaughter that Congress feared when it passed the Act.

The emasculation of the State Estray Laws by the Act places the State of Wyoming and the Board in a helpless position. When a rancher complains that his privately owned mare has just been stolen by a wild stud or a highway patrolman reports that wild horses on the highway have been involved with or were the cause of a highway accident, the State is unable to act. The State of Wyoming and the Board believe that the law is clear that the states have the rights and obligations to control wildlife within their borders. Such control is imperative to the proper and orderly management of the livestock industry in Wyoming.

ARGUMENT

The State of Wyoming and the Wyoming Livestock Board as Amici Curiae adopt and endorse the legal arguments

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[4]Wyoming State Report, Meeting of National Advisory Board on Wild Free-Roaming Horses and Burros, Reno, Nevada, September 18, 19, and 20, 1974.

as set forth in the Brief of the Appellees filed by the State of New Mexico and the Brief of Amici Curiae Central Committee of Nevada State Grazing Boards and Duckwater Shoshone Tribe.

CONCLUSION

The Congress of the United States, acting on the false premise that wild horses and burros are "fast disappearing from the American scene," has sought to protect such animals with a totally unworkable law. The Act passed by Congress seeks to exercise dominion over animals which are the property of the State of Wyoming and over such animals whether they be on public or private lands. The State of Wyoming must be allowed to exercise its Police Power over these animals if they and the livestock industry of the State are to survive.

Respectfully submitted,

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APPENDIX A

Pertinent parts of W.S. 11-498 thru 11-515 provide as follows:

11-498. Definition. Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced in the State of Wyoming whose owner is unknown in the territory where found, or the owner of which cannnot with reasonable diligence be found, or that is branded with two or more brands the ownership of which is disputed, neither party holding a bill of sale, shall be known as an estray, and it shall be unlawful for any person, persons, firm, company, association or corporation or their employees or agents to take up any such estray and retain possession of same, except as provided by law; provided further, that any such animal for which there is no sufficient proof of ownership found upon inspection, shall also be known as an estray.

11-500. Taking up estrays generally. No person shall take up an estray animal except in the county where he resides and is a freeholder, nor unless the same be found on lands owned, leased, or controlled by him or his duly authorized agents. When any such person takes up an estray animal he shall immediately notify an inspector who shall thereupon inspect, or cause to be inspected, the estray animal for brands and other evidence of ownership and who shall make a diligent effort to learn or determine ownership of the same. In his discretion, the inspector may cause any estray animal to be held for not more than ten days after such inspection, at a total expense of not more than fifty cents ($0.50) per day, to enable him to complete his investigation of ownership. If the estray animal is claimed by an owner, the bill for feed and care incurred by the inspector must be paid by the claimant. If the rightful owner cannot be found, or, when found, refuses or fails to pay the charges for feed and care of the estray animal, the inspector shall order

the estray animal sent to the most feasible convenient public market designated by the inspector, and there to be sold. Incurred charges for feed and care by the inspector and reasonable shipping and sales expense shall be paid from the proceeds of sale. The net proceeds, if any, received from the sale of the estray animal, after the deduction of authorized expenses, shall be forwarded to the estray fund of the agency. Said agency shall hold such proceeds in a special fund known as estray fund until the same are paid to the rightful owner of the estray animal or otherwise disposed of according to law.

Should the proceeds of sale of any estray animal or animals be insufficient to pay all legitimate expenses authorized by this act, the deficit shall be paid by the agency with the approval of the board.

11-503. Unclaimed horses—Permit for rounding up. Any person, persons, organization or corporation desiring to gather or round up unclaimed horses from the ranges within the State of Wyoming must, before commencing to engage in such activity, obtain written permission to do so. Such person may be entitled to a permit which must be obtained from the person, persons, organization or corporation who has ownership or control of the surface rights of the range whereon the unclaimed horses are to be gathered or rounded up. Said permit shall be presented to an inspector to be used for the basis for the issuance of any brand inspection permit for removal of such unclaimed horses from the county whereon such unclaimed horses are gathered or rounded up. The form of such permit shall be prescribed by the board.